United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7608

To be argued by
DONALD N. RUBY

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal Docket No. 75-7608

IRVING SANDERS,
Plaintiff-Appellee,

—against—

LEON LEVY, *et al.*,
Defendants-Appellants.

EGON TAUSSIG,
Plaintiff-Appellee,

—against—

SIDNEY M. ROBBINS, *et al.*,
Defendants-Appellants.

MICHAEL SHAEV and RITA SHAEV,
Plaintiffs-Appellees,

—against—

ERIC HAUSER, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal by defendants purportedly under 28 U.S.C. Section 1291 from an interlocutory order

and decision of the United States District Court for the Southern District of New York (Griesa, J.) determining that the above-entitled consolidated cases may be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all persons who purchased shares of defendant Oppenheimer Fund, Inc. (the "Fund") between March 28, 1968 and April 24, 1970; that, under the facts and circumstances of this case, the Fund shall bear the cost of culling out from its records a list of the class members and providing this list to plaintiffs, without prejudice to the right of said defendant, at the conclusion of the action, to make whatever claim it would be legally entitled to make regarding reimbursement by another party; and that the plaintiffs will be responsible for preparing and mailing the necessary notices at their expense, with plaintiffs to have the option of sending them out in a separate mailing or including them in a regular mailing of the Fund provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra cost of mailing. The principal decision of the District Court dated May 15, 1975, appears at page A-169 of the Appendix and the memorandum order of the District Court dated September 30, 1975, which essentially denied the motions for reargument, appears at page A-188 of the Appendix.

QUESTIONS PRESENTED

1.(a) Is the determination of the District Court that, under the facts and circumstances of this case, the Fund should bear the cost of culling out from its records a list of class members appealable as of right under the collateral order doctrine?

(b) Is the determination of the District Court that this action meets the requirements of Rule 23(b)(3) of the Federal Rules of Civil Procedure and that it may be maintained as a class action thereunder appealable as of right under the collateral order doctrine?

2. Did the District Court commit reversible error in determining that this consolidated action may be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure?

3. Did the District Court commit reversible error in determining that, under the facts and circumstances of this case, the Fund should bear the cost of culling out from its records a list of the class members?

STATEMENT OF THE CASE

A. THE PLEADINGS

The three captioned actions were brought by plaintiffs representatively on behalf of themselves and other persons similarly situated who purchased shares of the Fund subsequent to March 15, 1968, (A-119) and derivatively on behalf of the Fund, (A-119), which is an open-ended investment fund registered under the Investment Company Act of 1940 with net assets in excess of $500,000,000 (A-131). These actions, which are based upon alleged violations of the Securities Act of 1933 (15 U.S.C. Section 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.), and the Investment Company Act of 1940 (15 U.S.C. Section 80(a), et seq.) and various rules promulgated thereunder, are brought against defendant Oppenheimer Management Corporation (the "Manager"), which is the investment advisor to the Fund and the general distributor of its shares, defendant Oppenheimer & Co., which owns all of the voting stock of the Manager, and the individual defendants, who are directors of the Fund. Some of the individual defendants are also officers of the Fund, officers and directors of the Manager, and/or partners in Oppenheimer & Co.(A-119--A-171, A-10--A-46).*

The complaints in these actions allege, in substance, that the defendants caused the Fund to issue prospectuses and reports which were false and misleading in that, among other things, they failed to state that

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* References are to pages of the Joint Appendix.

the Fund would purchase "restricted" securities, and failed to describe the risks involved in such purdhases. The complaints further allege, in substance, that the defendants caused the Fund to improperly value the restricted securities in the Fund's portfolio, thereby overstating the net asset value of shares of the Fund which were sold to the public, and that the defendants caused the Fund to issue prospectuses and reports which were false and misleading in failing to disclose material information relating to the improper valuation of restricted securities in the Fund's portfolio, and that as a result of the foregoing, persons who purchased shares of the Fund subsequent to March 15, 1968 were caused to pay false and inflated prices for their shares of the Fund. The complaint further alleges that as a result of said improper valuation of restricted securities, the Fund was caused to pay the Manager excessive fees under its management agreement and to redeem shares at inflated prices. The plaintiffs seek to recover damages on behalf of the members of the class who paid excessive prices for their shares of the Fund; and derivatively, on behalf of the Fund, to recover any damages sustained by the Fund and the profits made by the other defendants, including the excessive fees paid to the Manager. (A-119--A-120, A-171--A-172, A-10--A-46).

The defendants have served amended answers denying any wrongdoing and asserting various affirmative defenses, (A-47--A-82) including an alleged set-off against those

members of the class who redeemed shares of the Fund since March 1968, for allegedly excessive amounts as a result of the overvaluation of restricted securities in the portfolio of the Fund. (A-56, A-71, A-80) In addition, the defendants other than the Fund, have asserted in their amended answers that if they are liable to the class by reason of the overvaluation of restricted securities in the portfolio of the Fund, then the Fund is liable to said defendants to the extent that the Fund has received funds from the class by reason of such over-valuation. (A-57, A-81)

B. PRIOR PROCEEDINGS

The three captioned actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively. (A-119) On November 17, 1969, the defendants moved for an order pursuant to Rule 42(a) of the FRCP consolidating said actions on the ground that they involved common questions of law and fact, appointing general counsel for the plaintiffs and enjoining any further actions for similar relief based upon claims which were the same or similar to those asserted in said three actions. (A-120) On December 17, 1969, said actions were consolidated by order of the Court for all purposes, the firm of Wolf Popper Ross Wolf & Jones, Esqs. was appointed general counsel for the plaintiffs and all persons claiming to be or to have been stockholders of the Fund were enjoined from commencing any other or further actions for any of the relief

sought in said actions or for a determination of any question of law or fact raised therein, except by means of intervention, if permitted by the Court.(A-120--A-121)

Thereafter, the plaintiffs conducted extensive discovery proceedings, including the service of two sets of interrogatories, the examination of numerous documents and the oral examination of several officers and directors of the Fund and the Manager. (A-121) The defendants also served interrogatories which have been answered by the plaintiffs. (A-87--A-115)

C. THE CLASS ACTION MOTION

On March 30, 1973, plaintiffs moved for an order pursuant to Rule 23(c)(1) of the FRCP declaring that this consolidated action may be maintained as a class action on behalf of all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 (hereinafter referred to as "the class period"). (A-116--A-119) In support of their motion for a class action determination, plaintiffs set forth information showing that all of the requirements for a class action under Rule 23(a)and (b)(3) of the FRCP were met. (A-118--A-128) Specifically, with respect to the provisions of Rule 23(a)(2) and (b)(3) the record shows that there are questions of law and fact common to the class within the meaning of Rule 23(a)(2) and that the common questions of law and fact predominate over any questions affecting only individual members within the meaning of Rule 23(b)(3). These common quesitons of law and fact, which are set forth in the record, (A-122--A-124) include:

1. Whether the prospectuses issued by the F d during the class period were false and misleading in that they failed to state that the Fund would purchase restricted securities;

2. Whether the prospectuses were false and misleading because of their failure to state the risks involved with respect to the purchase of restricted securities;

3. Whether the defendants used improper methods in valuing the restricted securities in the Fund's portfolio, including failing to apply proper discounts to the market prices of unrestricted securities of the same class;

4. Whether the prospectuses and periodic reports issued by the Fund were false and misleading in failing to disclose material information relating to the methods used by defendants in valuing restricted securities in the portfolio of the Fund;

5. Whether the prospectuses were false and misleading in stating that the Fund's shares were being offered at net asset value and failing to disclose that the net asset value of shares of the Fund was inflated as a result of the improper valuation of restricted securities in the portfolio of the Fund;

6. Whether the defendants' conduct violated the provisions of the Securities Act of 1933, the Securities and Exchange Act of 1934 and the Investment Company Act of 1940, and, if so, whether defendants are liable to the class as a result thereof.

The determination of individual damages should not present any undue difficulty in this case. The amount of overvaluation for each restricted security in the portfolio of the Fund can be established by showing what discount should have been applied by the defendants to the market price of said security during the class period because of its restricted nature. Once the amount of a proper discount is established, it is simply a matter of arithmetic to determine the daily amount of overvaluation. The inflation in the net asset value of shares of the Fund during the period resulting from the overvaluation of restricted securities can be charted and the process of computing individual damages should be virtually a mechanical task. (Plaintiffs' Memorandum In Response to the Additional Memoranda submitted by Defendants on July 17, 1974 in connection with plaintiffs' Motion For Class Action Determination).

The total aggregate damages suffered by the class is in the area of $1,500,000, giving rise to an average claim of $15, although many of the claims, including that of plaintiff Taussig, will be substantially larger. (A-152)* The cost

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* This information is based upon estimates of plaintiffs' counsel which was set forth in an affidavit which was submitted to the Court in response to a request by the Court for such information. (A-151--A-153) The estimates of plaintiffs' counsel were based upon their knowledge and experience as to appropriate discounts in situations involving restricted securities which was obtained in the course of extensive investigations in connection with this case and their experience in prior litigations involving the valuation of restricted securities. (A-151--A-152) The Plaintiffs' Further Answers To Interrogatories, which were

of administering this consolidated action and distributing a recovery to the members of the class should represent only a small fraction of the total recovery. (A-153) The distribution of a recovery should be quite simple and inexpensive. The recovery can be sent to those members of the class who are still shareholders of the Fund (approximately 85%) in a regular mailing by the Fund in the same way a dividend is distributed, and it can be mailed separately to the remaining members of the class who are no longer shareholders. (A-153)

The record does not indicate that there will be any undue difficulties encountered in the management of this action as a class action (A-174).

No questions have been raised about the inadequacy of the named plaintiffs and their counsel to represent the class (A-174).

Following the submission of the class action motion in March, 1973 (and after this Court rendered its decision in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), the plaintiffs, with the approval of the Court, conducted some discovery (principally the depositin ofthe Fund's transfer agent) to obtain additional information relating to the composition of the class and the appropriate method of giving notice to the class. The discovery disclosed the following information:

1. There were approximately 121,000 persons who purchased shares of the Fund during the class period (A-172, A-173);

2. The Fund currently had approximately 171,000 shareholders, of whom approximately 103,000 purchased shares of the Fund during the class period (A-145--A-174);

3. There were approximately 18,000 persons who purchased shares during the class period and were no longer shareholders of the Fund (A-174);

4. The names and addresses of the persons who purchased shares of the Fund during the class period could be culled out from the records of the Fund along with information indicating which of these persons were still shareholders of the Fund and which were not (A-149);

5. The cost of culling out the aforementioned information, which would involve the use and programming of computers, would be approximately $16,000 (A-149).

In December, 1973, after the foregoing information had been obtained by the parties, plaintiffs, in an affidavit submitted to the Court, modified their application relating to the definition of the class and requested that this action be maintained as a class action on behalf of all persons who purchased shares of the Fund during the class period, and who, like the plaintiffs, were still stockholders of the Fund (A-143). This modification, it was noted, would simplify the issues in the case by eliminating, at least in part, the defense asserted by defendants in their amended answers, to the effect that defendants were entitled to a set-off against those persons who purchased shares in the class period, but thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the

Fund's portfolio; would facilitate the distribution of any recovery to the class; and, most importantly, would reduce the costsincident to giving notice to the class and would, thus, facilitate the further prosecution of the case as a class action (A-143--A-144).

The definition of the class sought by plaintiffs would obviate the need for culling out the specific names and addresses of the members of the class from the Fund's records in order to give notice to the class since, if all of the members of the class were current shareholders of the Fund actual individual notice by mail to all members of the class apprising them of the pendency of the action and of their right to request exclusion from the class pursuant to the provisions of Rule 23 (A-145--A-148).

Moreover, since the proposed class was defined by the plaintiffs with precision (all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund on a specified date prior to the mailing of the class notice), there would be no problem in entering a judgment in the action, whether favorable or not to the class pursuant to Rule 23(c)(3), describing the persons who were bound by the judgment (A-146).*

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* In the event of a recovery in the action, the names and addresses of the class would, of course, be ascertained in connection with the distribution of the recovery (A-146).

Plaintiffs stated that they would pay for the cost of preparing the necessary notices and would pay for any extra costs involved in mailing the class notice in the manner proposed by them, including the cost of inserting the notice in a regular mailing by the Fund to all of its current stockholders (A-147). It was estimated that these costs, which the plaintiffs were prepared to pay, would be approximately $5,000 (A-147). If it were necessary, however, to ascertain the names and addresses of the class members in order to give notice to the class, the total costs involved in giving notice would be in excess of $20,000 (A-147); and the plaintiffs indicated that, if they were required to bear these costs, they could not continue prosecution of the action as a class suit (A-147).

The defendants opposed the definition of the class sought by plaintiffs which limited the class to persons who were still stockholders of the Fund, presumably because it would limit the res judicata effect of this action (A-174--A-175). However, since, at the same time, the defendants themselves sought to limit the class to persons who purchased shares of the Fund prior to April 25, 1969 (A-137), it is evident that, in seeking to have the class defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class), the defendants were interested in substantially

increasing the costs involved in giving notice in an effort to prevent the action from proceeding as a class suit.

Defendants also objected to the distribution of the class notice in the manner proposed by the plaintiffs (by directing the notice specifically to those shareholders of the Fund who purchased during the class period and enclosing the notice in a regular mailing of the Fund to all of its 171,000 shareholders) claiming that this method would result in the notice being received by aproximately 68,000 shareholders of the Fund who were not members of the class, and that this would, somehow, have an adverse affect on the Fund, including allegedly precipitating a flood of redemptions by these shareholders (A-138--A-141). In response to defendants' objections, plaintiffs pointed out that since 1970, the Fund had apprised its shareholders in its proxies, prospectuses and annual reports, no less than 13 times, of the pendency of this action, and the nature of the claims alleged herein, and of the fact that, in the opinion of their counsel, and counsel for the Manager, the suits have "no legal merit". Plaintiffs contended that the defendants had not made an adequate showing to support their claims of alleged harm, and that defendants' claims were essentially frivilous and were motivated by a desire to maximize the costs of giving notice in this case so as to prevent the action from proceeding as a class suit, and that defendants had not raised any valid objections to the method of giving notice propsoed by the plaintiffs (A-148--A-150).

All of the issues raised by plaintiffs' motion for a class action determination were fully explored and briefed by the parties and were carefully considered by the Court prior to its decisions on the motion. On several occasions the Court requested additional information and briefing with respect to various matters, including the definition of the class, the manageability of this action as a class action, the appropriate method of giving notice to the class in this case, the effect of the decision by this Court in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir., 1973) ("Eisen III"), and the appropriate allocation in this case of the cost of culling out a list of class members from the Fund's records in light of the facts and circumstances herein and the principles applicable thereto under the discovery rules. During the pendency of the class action motion, there were numerous affidavits and briefs submitted by the parties to the Court relating to the issues raised by the class action motion. In addition, the Court held several hearings relating to said motion before it rendered its decisions from which the defendants have now appealed to this Court (A -3-A-7, Documents 33, 34, 40-43,45, 49-52,70, 78, 79, 82-87,89-98, 101-111,113).

DECISION AND MEMORANDUM ORDER OF THE DISTRICT COURT

On May 15, 1975, Judge Griesa rendered a decision determining that the consolidated action may be maintained as a class action under Rule 23(b)(3) of the FRCP on behalf

on all persons who purchased shares of the Fund between March 15, 1968* and April 24, 1970 (A-170).** The District Court found that the "requirements of a class action under Rule 23 are clearly met in the present case" (A-172). With respect to the requirement that there be common questions of law and fact and that they predominate over questions affecting only individual members, the District Court said:

> "There are questions of law and fact common to the class within the meaning of Rule 23(a)(2) and, indeed, it is clear that the questions of law and fact common to the members of the class predominate over any question affecting only individual members, within the meaning of Rule 23(b)(3). The core of the class claims relates to the questions about whether or not material information about the valuation of restricted sec urities was withheld from investors in the Fund. There are also the questions relating to the responsibility of the various defendants in the event that there was a withholding of material information. All of these matters relate to issues common to the class. It is by now established that in such a situation, a class action is apropriate, despite the fact that there may be individual issues relating to causation and damages." (A-173)

The Court also found on the basis of the record presented, that the class claims were not unmanageable within the meaning of Rule 23(b)(3). The Court stated:

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* The starting date of the class period was modified in Judge Griesa's memorandum order of September 30, 1975, on consent of the parties, to March 28, 1968 (A-189).

** The Court rejected the defendants' claim that the class should be limited to persons who purchased prior to April 25, 1969 (A-176--A-177).

> "On the basis of the information presently available, I am of the opinion that it would be inappropriate to declare these class claims unmanageable. At least as far as the present record shows, these class claims partake of no more difficulty than is attendent upon the claims in numerous class actions which the federal courts have entertained. If, at a later point in the action, clearer demonstration of unmanageability is made, the Court can deal with this problem " (A-173--A-174).

With respect to the definition of the class, the method of giving notice to the class, and the allocation of the costs of culling out from the records of the Fund a list of the names and addresses of the class members, the District Court rendered a decision which took into account the respective positions and proposals urged by the parties with respect to these matters, and constituted the Court's considered judgment as to what rulings would be appropriate based upon the particular facts and circumstances in this case (A-170, A-174--A-178). The Court agreed to define the class as requested by the defendants to include those persons who were no longer shareholders of the Fund and agreed to defendants' related request that notice not be sent out in the manner proposed by the plaintiffs by including the notice in a regular mailing to all current shareholders of the Fund, but that the notices be sent only to those current shareholders of the Fund who are class members, thereby necessitating the identification of the specific names and addresses of class members in order to give notice to the class (A-176--A-178). With regard to the cost of culling out a list of the names and

addresses of the class members, the Court determined that it would be appropriate on the basis of the facts and circumstances of this case that this additional expense, which was necessitated by the defendants' requests with regard to the definition of the class and the method of giving notice to the class, be the responsibility of the defendants and the Court indicated that the Fund should bear the cost of culling out from its records a list of the names and addresses of the class in this case. In reaching this decision, the Court stated:

> "Moreover, with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (A-175)

The Court further determined that the plaintiffs would be responsible for preparing and mailing the necessary notices to the members of the class at their expense.(A-170, A-178).

After all parties moved for reargument, the Court, in a memorandum order dated September 30, 1975, denied essentially all of the motions for reargument. The Court indicated in its memorandum order that the cost of culling out the list of class members shall be borne by the Fund without prejudice to the right of this defendant at the conclusion of the action to make whatever claim it would be

legally entitled to make regarding reimbursement by another party;* and that as to the mailing of notices, plaintiffs are to have the option of (a) sending them out in their own mailing, or (b) including them in a regular mailing of the Fund, provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra cost of mailing, including the cost of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders (A-189--A-190).

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* In its motion for reargument, the Fund had requested the Court to clarify its ruling as to which of the defendants are to bear the cost of culling out the names and addresses and, that, if the Court required the Fund to bear such cost, its ruling should set forth that the payment at this time is an advance and that there has been no determination of the question of contribution. (Memorandum in Support of Defendant Oppenheimer Fund, Inc.'s Motion For Reargument,p. 7) It may be noted that the Court, had, in fact, already indicated in its decision of May 15, 1975, that the Fund was to be responsible for this cost.(A-170) The Manager, in its motion for reargument, asserted that "If the defendants are to bear the cost of preparing lists, such cost should be advanced in the first instance by the Fund, as provided in the Court's opinion (at p.2)." (Memorandum of Oppenheimer Defendants In Support of Motion to Reargue The Class Action Motion, p. 5).

POINT I

THE DETERMINATION OF THE DISTRICT COURT TO GRANT DEFENDANTS' REQUESTS WITH RESPECT TO THE DEFINITION OF THE CLASS AND THE METHOD OF GIVING NOTICE AND TO REQUIRE THEM TO PAY THE ADDITIONAL COSTS INCIDENT TO GIVING NOTICE RESULTING THEREFROM WAS A DISCRETIONARY FUNCTION RATHER THAN A DETERMINATION OF JUDICIAL POWER. THE DETERMINATION THAT THE ACTION MET THE REQUIREMENTS OF RULE 23 (b)(3) WAS LIKEWISE DISCRETIONARY IN NATURE. ACCORDINGLY, SAID DETERMINATIONS ARE NOT APPEALABLE AS OF RIGHT UNDER THE COLLATERAL ORDER DOCTRINE.

Since an order granting class action status is not a final order terminating the action (28 United States Code, Section 1291), such order must come within an exception to the "final judgment" rule in order to be appealable as of right. Thus, defendants contend that the instant order granting class action status comes within the "collateral order" exception to the general rule prohibiting appeals of interlocutory orders.

The collateral order doctrine is exemplified in the leading case of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1947). In that case, the District Court had determined that a state statute requiring plaintiff in a derivative suit to post security for expenses was not applicable in a federal case. The Supreme Court noted that there would be no appeal from "any decision which is tentative, informal or incomplete". But, said the Court in allowing an appeal:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to rights asserted in the actions, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.
>
> " We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." (337 U.S.at 546).

The Court went on to note the distinction between a court's ruling concerning the right to security and a discretionary exercise of such right, and indicated that only orders involving the former would be appealable as of right.

More recently, in Eisen v. Carlisle & Jacquelin 417 U.S. 156 (1974) ("Eisen IV"), the Supreme Court found the collateral order rule to be applicable to an order in which the District Court had determined under Rule 23 of the Federal Rules of Civil Procedure that notice to identifiable class members was necessary and that Rule 23 costs of notice could be imposed on defendants after a preliminary hearing on the merits indicated that plaintiff was more than likely to prevail. The Supreme Court, in applying the Cohen rationale, held that such order was appealable, and that, contrary to the view of the District Court, the Notice required by Rule 23(c)(2) must be given to all identifiable class members and the costs involved in giving such Notice should be borne by plaintiff alone since "the usual rule is that a plaintiff must bear the cost of notice to the class". (417 U.S.178).

This Court has taken a most restrictive view toward the appealibility of orders under the collateral order doctrine Weight Watchers of Philadelphia, Inc. v. Weight Watchers, International Inc., 455 F.2d 770 (2d Cir., 1972); Donlon Industries, Inc., v. Forte, 402 F.2d 935 (2d Cir. 1968); Bancroft Nav. Co. v. Chadade Steamship Co., 349 F.2d 527 (2d Cir. 1965). This restrictive attitude toward the expansion of the Cohen exception is also evidenced in this Court's recent decisions involving the appealability of orders determining that a class action is maintainable, Handwerger v. Ginsberg,- F.2d - (2d Cir. July 16, 1975)(Slip Op.,No. 75-7095); Parkinson v. April Industries, Inc., 520 F.2d 650 (2d Cir. 1975); General Motors Corp. v. City Of New York, 501 F.2d 639 (2d Cir. 1974); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974).*

In its comprehensive discussion of the appealability of orders granting class action status in Parkinson v. April Industries, Inc. supra, this Court recognized the "renewed emphasis on the policies of finality" and indicated that only in "extraordinary circumstances" would the court allow exceptions to the final judgment rule. 520 F.2d at 657-8. This Court in its decision in General Motors Corp. v. City of New York, supra, at p. 646

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* Three other circuits have denied absolutely the right of review under 28 U.S.C. 1291 of an order determining that a class action is maintainable. See Thill Securities Corp. v. New York Stock Exchange, 469 F.2d 14 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969); Blackie v. Barrack, CCH Fed.Sec.L.Rep. Par. 95312 (9th Cir. 1975).

viewed the decison in Eisen IV as reaffirming that only exceptional circumstances would justify a departure from the policy of finality.

The decisons of this Court have uniformly held that where the ruling sought to be reviewed is "not a finite and conclusive determination of judicial power," i.e. a discretionary decision, "and is not unprecedented and extraordinary", the "collateral order doctrine" does not apply. General Motors Corp. v. City of New York supra, at 646-647; Parkinson v. April Industries Inc., supra, at 658. Donlon Industries, Inc. v. Forte supra, at 937.

In the General Motors Corp. case, the Court dismissed an appeal from the District Court's order granting class action status. The appeal involved the lower court's rulings that predominating common questions were present and that the class action was superior to other available methods. The court, in holding that the collateral order doctrine did not apply, stated:

> "Accordingly, we would review here not a finite and conclusive determination of judicial power-- e.g., the power to shift notice costs and forego individualized notice, as in Eisen, or the power to dispense with security, as in Cohen--but a discretionary decision, the propriety of which will necessarily vary from case to case. That this distinction is of fundamental importance in the calculus of appealability was plainly acknowledged in Cohen itself. 501 F.2d at 647 (emphasis added)

In Parkinson, this Court quoted the portion of its decision in General Motors Corp. quoted above and similarly held that the issues concerning joinder, numerosity and the predomination of common questions over individual questions were discretionary matters and therefore dismissed the appeal from the class action certification.

The present appeal involves two aspects of Rule 23 of the Federal Rules of Civil Procedure. One aspect relates to the notice requirements of Rule 23 (c)(2) and the other aspect relates to the requirements of Rule 23(b)(3).

With regard to the District Court's determination herein concerning the notice requirements of Rule 23 (c)(2), Cohen and Eisen IV and the other authorities discussed hereinabove together indicate that if the Court's ruling was merely discretionary, the collateral order doctrine will not apply.* We submit that the District Court's decision was clearly one of discretion.

The instant case is in sharp contrast to the fact situation in Eisen IV. Unlike Eisen IV there is no issue in this case concerning the power of the court to do without actual

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* While this Court in Parkinson v. April Industries, Inc., supra set forth a "three pronged test" which had been utilized in prior cases as a touchstone to ascertain the appealability of orders determining that the requirements of Rule 23 (a) and (b)(3) have been satisfied (529 F.2d 658), the Supreme Court in Eisen IV did not utilize this test in applying the Cohen collateral order doctrine to the issue of whether the notice requirement of Rule 23(c)(2) was satisfied. As indicated hereinabove, the collateral order doctrine does not apply in any form if the challenged decision was discretionary.

notice to identifiable class members or to impose upon the defendants necessary costs of distributing notice to the class. In the present case, plaintiffs sought to represent a valid class* consisting of all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund, and proposed giving notice to the class by enclosing the notice in a regular mailing to all of the Fund's shareholders, a large majority of whom are class members. The method of giving notice proposed by plaintiffs would have satisfied the provisions of Rule 23 and the requirements of due process** without requiring the specific identification of the names and addresses of the class members. Plaintiffs agreed that they would pay for the cost of preparing the necessary notices and would pay for any extra costs involved in mailing the class notice in the manner proposed by them including the cost of inserting the notice in a regular mailing by the Fund to all its current stockholders.

The defendants, however, sought to have the class more broadly defined to include persons who were no longer stockholders of the Fund and to limit the mailing of the notice to those stockholders of the Fund who were class members, thereby necessitating the specific identification of the names and addresses of the class members. Since the District Court could have lawfully adopted the plaintiffs' proposals which would

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* See discussion and cases cited in Point III, infra, at pp.50-53.

** See discussion and cases cited in Point III, infra, at pp. 53-55, 56-58.

have avoided the additional cost of identifying the names and addresses of class members, it had discretion to determine whether, if it agreed to grant defendants' request with regard to the definition of the class and the method of giving notice, it should require defendants to bear the additional cost caused by defining the class and giving notice in the manner sought by them.

Since the District Court's rulings with regard to the definition of the class,the method of giving notice and the allocation of the added cost of identifying the class members were in a discretionary area*, the collateral order rule does not apply and this Court should dismiss the appeal on this aspect.

We next discuss the District Court's ruling that the requirements of Rule 23(a) and (b)(3) were met. This Court has developed a "three pronged test" to help determine whether such order comes within the collateral order doctrine. The threepronged test is as follows:

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* The citation in defendants Briefs of numerous cases under the federal discovery rules serves only to reemphasize the discretionary nature of the instant ruling. It is well recognized that, with respect to information requested in interrogatories, "the degree to which the defendant must expend time, effort and money in gathering such information is a matter within the discretion of the court." Harvey v. Eimco Corporation, 28 F.R.D. 381 (E.D.Pa. 1961). See generally, 4A Moore's Federal Practice Par. 33.02 at p.33-17, and Par. 33.20 at pp.33-100,33-101 (1975 ed.). Discovery orders are generally not appealable under the collateral order doctrine. American Express Warehousing Ltd. v. Transamerica Ins. Co., 380 F.2d 277 (2d Cir. 1967).

"(1) whether the class action determination is 'fundamental to the further conduct of the case';

(2) whether review of that order is 'separable from the merits'; and

(3) whether the order will cause 'irreparable harm to the defendant in terms of time and money spent in defending a huge class action.'" (Parkinson v. April Industries, Inc. supra, at 656)

If any of these three criteria are not met, the issue is not appealable. Handwerger v. Ginsberg, supra. In the present case, it is clear that the second "prong" cannot be satisfied since review of the determination below that common questions predominate and that the class action is manageable would involve a determination related to the merits of the case. In attempting to show that the requirements of Rule 23(b) (3) cannot be met, defendants contend that proof of liability and damages "may well involve millions of individual computations", Brief of defendant-Manager at pp. 39,42; and that the aggregate damages sustained by the class may not be as great as plaintiffs claim. Defendant-Manager's Brief, pp. 39-43; defendant Fund's Brief, pp.22-25. Plaintiffs contend, however, that the determination of liability and the computation of individual damages should not present any undue difficulties of proof in the instant case because the amount of overvaluation for each restricted security in the portfolio of the Fund can be established by showing what proper percentage discount should have been applied by the defendants to the market prices of said security during the class period because of its restricted nature and once the amount of a proper discount is established,

it is simply a matter of arithmetic to determine the daily amount of overvaluation; and the inflation in the net asset value of shares of the Fund during the class period resulting from the overvaluation of restricted securities can then be charted and the process of computing individual damages will become virtually a mechanical task. Plaintiffs also contend that the aggregate damages suffered by the class in the instant case are in the area of $1,500,000 and that the cost of administering this action and distributing a recovery to the members of the class should represent only a small fraction of the total recovery. To determine whether the difficulties of proof cause individual questions to predominate and render this suit unmanageable or whether the total damages involved will not substantially exceed the cost of administering this action and distributing a recovery to the members of the class, as claimed by defendants, this Court would have to become involved in the merits of the case since it would have to consider whether improper methods of valuing restricted securities were used by the defendants and whether proper standard discounts could be applied in determining liability and in computing damages,as plaintiffs contend, and whether the amount of damages involved is $1.5 million as plaintiffs claim or is something less than that, as defendants assert. See General Motors Corp. v. City of New York, supra, at 645.

The District Court has, of course, considerable discretion in the management of the action and it can modify its class action determination at any later time if facts should indicate that class treatment is inappropriate. General Motors Corp. v. City of New York, supra, at 647; Parkinson v. April Industries, Inc., supra, at 653. Moreover, in the present case, Judge Greisa, specifically noted that his determination was a provisional one. He state:

> "If, at a later point in the action, a clearer demonstration of unmanageability is made, the Court can deal with this problem." (A 174).

Thus, this Court should not undertake to now review what is essentially a provisional ruling. See Cohen v. Beneficial Industrial Loan Corp., supra, at 546.

In both Parkinson and General Motors Corp., this Court recognized that an appellant would not be able to satisfy the three-pronged test if he merely questioned the propriety of a discretionary ruling that the requirem ents of Rule 23(b)(3) had been met. Parkinson v. April Industries, supra, at 658. This Court has held that such questions as whether common questions predominate and whether a class action is superior are discretionary. Parkinson v. April Industries, supra; General Motors Corp. v. City of New York, supra. Such issues are intertwined with questions of manageability. See Br. of Defendant-Manager, pp. 37-43.

Defendants refer to footnote 9 in Parkinson v. April Industries, Inc., supra, in which the Court suggested that, in extraordinary cases, questions of manageability may require an immediate appeal. Br. of Defendant-Manager, p.47 However, they do not even attempt to explain how the present case presents such an extraordinary situation. In fact, as Judge Griesa noted in his opinion, "these class claims partake of no more difficulty than is attendant upon the claims in numerous class actions which the federal courts have entertained." (A 174).

Apparently recognizing the futility of attempting to show that the instant case involves "discrete and aggravated questions of manageability" (Parkinson v. April Industries, Inc., supra, footnote 9), defendants merely assert that the Court should review the Rule 23(b)(3) determination based upon the court's alleged jurisdiction over the notice question. However, it is well settled that this Court will not consider "pendent" appellate jurisdiction over non-appealable discretionary orders except where the factors involved in the appealable and non-appealable orders overlap. Such is clearly not the case here. See General Motors

Corp. v. City of New York, supra; cf., Green v. Wolf Corp., 406 F.2d 291, 302 (2d Cir. 1968), where pendent appellate jurisdiction was exercised where an appellate ruling on a new and important issue of first impression could save time by avoiding a possible retrial, and would result in a more expeditious trial in the court below. Moreover, a non-appealable discretionary order should not be reviewed where, as here, there is no prima facie showing of abuse of discretion. General Motors Corp. v. City of New York, supra; 9 Moore's Federal Practice, Par. 110.25 [1], p. 272 (1975 ed.).

Thus, while we submit that this Court lacks jurisdiction of this appeal with regard to each of the issues under Rule 23(c) and Rule 23(b)(3) considered separately, we further submit that the Court should not exercise pendent appellate jurisdiction to hear the Rule 23(b)(3) issues even assuming arguendo there is appellate jurisdiction with respect to the notice issue.*

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* Defendants also claim that Eisen III supports review of Rule 23(c) and Rule 23(b)(3) issues together. Without recounting the history of the Eisen cases in detail, it should be noted that initial review of the denial of class action status was based on the "death knell theory" under which the Court in Eisen II considered the class action determination and the notice question and retained jurisdiction over the action. In Eisen III, the Court reviewed the notice and Rule 23(b)(3) questions upon the theory of retained jurisdiction. In the present case, unlike Eisen III, this is the first appeal to this Court and there is no theory of retained jurisdiction to justify the instant appeal. The Supreme Court in Eisen IV did not reach the question of whether the Court of Appeals had jurisdiction over the issue of manageability under the theory of retained jurisdiction. See Eisen IV footnote 10.

POINT II

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DETERMINING THAT THIS CONSOLIDATED ACTION MAY BE MAINTAINED AS A CLASS ACTION UNDER RULE 23(b)(3) OF THE FRCP

A. THE DETERMINATION BY THE DISTRICT COURT WAS DISCRETIONARY AND SHOULD NOT BE DISTURBED UNLESS THERE WAS AN ABUSE OF DISCRETION

It has been well recognized that the district court has broad discretion in determining whether a class action should be maintained and that an appellate court, upon review, should not disturb the district court's determination unless there has been abuse of such discretion. City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969); Price v. Lucky Stores, Inc., 501 F.2d 1177 (9th Cir. 1974).

In City of New York v. International Pipe & Ceramics Corp., supra, this Court, in dismissing an appeal from a district court determination that the action was not maintainable as a class action, recognized the broad discretion of the district court in making a determination under Rule 23 of the FRCP. After a brief discussion of the benefits and drawbacks of allowing one lawsuit instead of many, this Court stated that:

> "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation." 410 F.2d at 298.

This Court noted in City of New York v. International Pipe & Ceramics Corp., supra, that the district court, in deciding that the action was not maintainable as a class action, "was acting within the very discretionary area which new Rule 23 gives to the trial judge." 410 F.2d at 300.

This Court also added that:

> "In final analysis, resolution of the question now presented refers to the 'fair and efficient adjudication' problem. The trial judge will have to face this problem in a realistic way. He should be afforded the greatest latitude in the exercise of his judgment after a careful factual exploration as to how this result can be attained." 410 F.2d at 300.

Other federal appellate courts have similarly recognized that the discretion of the district court should not be disturbed unless there is an abuse of discretion. In Price v. Lucky Stores, Inc., supra, the Court stated:

> "A class action determination under Fed.R.Civ.P. 23 is one of a trial court's considered discretion. As was stated in City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295,298 (2d Cir. 1969), 'the judgment of the trial court should be given the greatest respect and the broadest discretion, particularly if. . . he has canvassed the factual aspects of the litigation.' This is so because the district court is in the best position to consider the most fair and efficient procedure for conducting any given litigation. Such a determination by the court will not be disturbed on appeal unless the party challenging it can show an abuse of discretion. Wilcox v. Bank of Kansas City, 474 F.2d 336 (10th Cir. 1973); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Hackett v. General Hose Corp., 455 F.2d 618 (3rd Cir. 1972); City of New York v. International Pipe & Ceramics Corp., supra." 501 F.2d at 1179.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THIS ACTION MAY BE MAINTAINED AS A CLASS ACTION UNDER RULE 23(b)(3)

The complaints in this case allege that the defendants caused the Fund to issue prospectuses and reports which were false and misleading in that, among other things, they failed to state that the Fund would purchase restricted securities and failed to describe the risks involved in such purchases; that the defendants caused the Fund to improperly value the restricted securities in the Fund's portfolio, thereby overstating the net asset value of the shares of the Fund which were sold to the public, that the defendants caused the Fund to issue prospectuses and reports which were false and misleading in failing to disclose material information relating to the improper valuation of restricted securities in the Fund's portfolio, and that by reason of the foregoing, the defendants violated the federal securities laws, and as a result thereof, persons who purchased shares of the Fund during the class period were caused to pay false and inflated prices for their shares of the Fund.

The District Court found that the requirements of a class action under Rule 23 were clearly met in the present case. Specifically, the District Court found that the requirements of Rule 23(a)(2) and (b)(3) which together require that there be common questions of law and fact and that the common questions predominate over questions affecting only individual members, were satisfied in the instant case.

The District Court stated:

> "There are questions of law and fact common to the class within the meaning of Rule 23 (a)(2) and, indeed, it is clear that the questions of law and fact common to the members of the class predominate over any question affecting only individual members, within the meaning of Rule 23(b)(3). The core of the class claims relates to the questions about whether or not material information about the valuation of restricted securities was withheld from investors in the Fund. There are also the questions relating to the responsibility of the various defendants in the event that there was a withholding of material information. All of these matters relate to issues common to the class. It is by now established that in such a situation, a class action is appropriate, despite the fact that there may be individual issues relating to causation and damages." (A-173)

The determination by the District Court that the aforesaid requirements of Rule 23(a)(2) and (b)(3) were satisfied in the instant case is amply supported by the record in this case and by applicable authority. First of all, the basis for the defendants' motion to have these actions consolidated and to enjoin any additional actions from being brought by members of the class was the recognition that the claims of members of the class were based upon common issues of law and fact. These common questions of law and fact, which are set forth in the record, include:

1. Whether the prospectuses issued by the Fund during the class period were false and misleading in that they failed to state that the Fund would purchase restricted securities;

2. Whether the prospectuses were fales and misleading because of their failure to state the risks involved with respect to the purchase of restricted securities;

3. Whether the defendants used improper methods in valuing the restricted securities in the Fund's portfolio, including failing to apply proper discounts to the market prices of unrestricted securities of the same class;

4. Whether the prospectuses and periodic reports issued by the Fund were false and misleading in failing to disclose material information relating to the methods used by defendants in valuing restricted securities in the portfolio of the Fund;

5. Whether the prospectuses were false and misleading in stating that the Fund's shares were being offered at net asset value and failing to disclose that the net asset value of shares of the Fund was inflated as a result of the improper valuation of restricted securities in the portfolio of the Fund;

6. Whether the defendants' conduct violated the provisions of the Securities Act of 1933, the Securities and Exchange Act of 1934 and the Investment Company Act of 1940, and, if so, whether defendants are liable to the class as a result thereof.

Plaintiffs have alleged, in the instant case, a continuous and common course of conduct directed against all members of the class. It is evident that there is a common nucleus of operative facts in this action and that

facts in this action and that the questions of law and fact common to the class predominate over questions affecting only individual members. The maintenance of a class action has been consistently allowed under these circumstances by the courts. Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir. 1964) ("since the complaint alleges a common course of conduct over the entire period, directed against all investors, generally relied upon, and violating common statutory provisions, it sufficiently appears that the questions common to all investors will be relatively substantial"); Fischer v. Kletz, 41 F.R.D. 377, 381 (S.D.N.Y. 1966) ("interrelated, interdependent, and cumulative" financial statements); 3A Moore, Federal Practice Para. 23.10 at 3443 (2d ed. 1967) ("The spurious class action has proved useful where a large number of purchasers or holders of securities claim to have been defrauded by a common course of dealing on the part of the defendants"); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (N.D. Cal. 1967) ("there is present herein a common nucleus of operative facts even though there may be lacking complete identity"); Dolgow v. Anderson, 43 F.R.D. 472, 489 (E.D.N.Y. 1968) ("Plaintiffs have successfully brought themselves within the 'common course of conduct' line of cases. They have alleged a 'continuous and common plan' to manipulate the price of Monsanto stock."); Green v. Wolf Corp., 406 F.2d 291 (2nd Cir. 1968) cert. denied, 395 U.S. 977 (inter-related misrepresentations in numerous prospectuses warrant class action treatment).

In Dolgow, the Court stated:

> "There can be little doubt that an action on behalf of a group of defrauded securities purchasers presents a particularly appropriate reason for a class action. The resolution in one litigation of the common questions relating to the existence, character, and materiality of the alleged false statements avoids the need for each njured investor to attempt to prove -- and for the defendants to disprove -- anew these basic allegations. Thus, it is virtually certain that a class action will achieve economies of time, effort and expenses, and promote uniformity of decision as to persons similarly situated." 43 F.R.D. at 488.

In Escott v. Barchris Construction Corp. 340 F.2d 731 (2nd Cir. 1965), this Court stated:

> "A fraud perpetuated [perpetrated] on numerous persons by the use of similar misrepresentations, is an appealing situation for a class action and the obvious desirability of avoiding multiplicity of actions turns us towards fav oring the representative suit and encouraging its use." 340 F.2d at 733.

Furthermore, in a recent decision by the Court of Appeals for the Ninth Circuit in Blackie v. Barrack, Current CCH Fed. Sec. L. Rep. Para. 95,312 (9th Cir. 1975), the court, in affirming the determination by the district court that the action could be maintained as a class action, rejected a number of arguments made by the defendants which are similar to those advanced by the defendants in the instant case. In reaching its decision that there were common questions of law and fact which warranted a class action determination, the court stated:

"Because the alleged misrepresentations are contained in a number of different documents, each pertaining to a different period of Ampex's operation, the defendants argue that purchasers throughout the class period do not present common issues of law or fact. They reason that proof of 10b-5 liability will require inspection of the underlying set of facts to determine the falsity of the impression given by any particular accounting item presented; that the underlying facts fluctuate as the business operates (i.e., inventory is bought and sold, accounts are paid off and created); thus, proof of the actionability of a current accounting representation or omission will apply only to those who purchased while a financial report was current; from which they conclude no common question is presented and a class is improper.

"We disagree. The overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the 'common question' requirement. Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit. See Green v. Wolf Corporation, 406 F.2d 291, 298 (2d Cir. 1968); Esplin v Hirschi, 402 F.2d 94 (10th Cir. 1968); Harris v. Palm Springs Alpine Estates, 329 F.2d 909 (9th Cir. 1964); U.S. Financial Securities Litigation, 64 F.R.D. 443 (S.D. Cal. 1974); Aboudi v. Daroff, 65 F.R.D. 388 (S.D.N.Y. 1974); Werfel v. Kramarksy, 61 F.R.D. 674 (S.D.N.Y. 1974); In re Memorex Security Cases, 61 F.R.D. 88 (N.D. Cal. 1973); Siegel v. Realty Equities Corporation of New York, 54 F.R.D. 420 (S.D.N.Y. 1972); Herbst v Able, 47 F.R.D. 11 (S.D.N.Y. 1969); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Siegel v. Chicket Delight, Inc., 27' F.Supp. 722 (N.D. Cal. 1967); Fischer v. Kletz, 41 F.R.D. 377, 381 (S.D.N.Y. 1966); Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42 (S.D.N.Y. 1966)." (CCH Fed. Sec. L. Rep. Par. 95,312 at p. 98,581-98,582).

In Blackie v. Barrack, supra, instead of being charged with having inflated the price of shares of the Fund by using improper methods in valuing restricted securities and by having over-valued such securities, as in the isntant case, the defendants were charged with having inflated the price of the stock purchased by class members by the understatement of reserves, the overstatement of inventory and the alleged improper use of accounting principles during the class period. The defendants in Blackie argued, as do defendants in the instant case, that a class action should be denied because each class member would have to depend upon proof of a different set of facts to establish his claim. In rejecting defendants' contention, the court said:

> "...Defendants misconceive the requirement for a class action; all that is required is a common issue of law or fact. Even were we to assume that the reserves were at some points during the period adequate, the class members still would be united by a common interest in the application to their unique situation of the accounting and legal principles requiring adequate reserves -- i.e., by a common question of law....
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> "...The alleged inventory overvaluation likewise presents common issues....
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> "Plaintiffs...are complaining of the balance sheet effect of inventory overvaluation. They are alleging that by failing throughout the class period to recognize and account for inventory obsolescence each time the inventory was valued, the company consistently inflated the value at which it carried inventory on the balance sheet. In effect, plaintifts are complaining of a consistent disregard of the

> accounting principle that inventory be valued at 'lower of cost or market.' Again, common questions of law and facts are presented." CCH Fed. Sec. L. Rep.Par. 95,312 at pp. 98, 583-98, 584.

Furthermore, as indicated by the District Court, it is now well established that the fact that there may be some individual issues in the case, such as the damages sustained by each class member, does not make the action unmanageable and should not prevent class action treatment. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2nd Cir. 1968). The Advisory Committee Notes on Rule 23 emphasize the usefulness of a class action notwithstanding the existance of some individual issues:

> "(A) fraud perpetrated on numerous persons by the use of similar misrepresentation may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." 39 F.R.D. at 103.

In Dolgow v. Anderson, supra, the Court stated:

> "The common issues need not be dispositive of the entire litigation. The fact that questions peculiar to each individual member of the class may remain after the common questions have been resolved does not dictate the conclusion that a class action is not permissible...."
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> * * *
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> "If plaintiffs prevail on the common issues, the court...should have little difficulty developing equitable procedures appropriate to the circumstances of this case, to dispose of any individual issues." 43 F.R.D. at 490, 491.

Moreover, contrary to defendants assertions, the determination of liability and the computation of individual damages should not present any undue difficulties of proof in the instant case. The amount of overvaluation for each restricted security in the portfolio of the Fund can be established by showing what proper percentage discount should have been applied by the defendants to the market price of said security during the class period because of its restricted nature. Once the amount of a proper discount is established, it is simply a matter of arithmetic to determine the daily amount of overvaluation. The inflation of net asset value of shares of the Fund during the class period resulting from the overvaluation of restricted securities can then be charted and the process of computing individual damages should be virtually a mechanical task. In discussing a similar problem, the court in Blackie v. Barrack, supra stated:

> "The amount of damages is invariably an individual question and does not defeat class action treatment. E.g., U.S. Financial Securities Litigation, supra, at 448 n.5, and cases there cited. Moreover, in this situation we are confident that should the class prevail the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task. CCH Fed. Sec.L. Rep. Para. 95, 312 at p. 98,584.

None of the cases cited by defendants in support of their contention that the District Court abused its discretion in determining that the requirements of Rule

23 (b)(3) were satisfied in the instant case even remotely resemble the facts in the instant case. E.g. Morris v. Burchard, 51 F.R.D. 530 (S.D.N.Y. 1971) involved a disconnected series of oral statements; Cotchett v. Avis Rent-A-Car Systems, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972) involved the presence of approximaterly 60,000 counterclaims asserted by the defendant against class members based upon wholly separate and independent facts not related to plaintiff's claims and which appeared to exceed the amount of plaintiff's claims;* Schaffner v. Chemical Bank, 339 F. Supp. 329 (S.D.N.Y. 1972) involved an action by a beneficiary of a trust on behalf of beneficiaries of other trusts in which the plaintiff had no interest and which were based upon separate trust instruments, having different provisions and subject to different state laws.

Defendants also contend that the District Court erred in determining that this action may be maintained as a class action on the ground that this action is "unmanageable" by virtue of the small size of the claims involved. Defendants' contention is neither borne out by the facts nor supported by relevant authority. The total aggregate damages suffered by the class in the instant case is in the area of $1,500,000, with the average claim being approximately $15,

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* By contrast, in the instant case, defendants alleged set-offs are based upon the same facts as plaintiffs' claims. i.e. the overvaluation of restricted securities in the portfolio of the Fund, and the amount of these alleged set-offs constitute only a small fraction of plaintiffs' claims.

although many of the claims will be substantially larger. The cost of administering this action and distributing a recovery to the members of the class should represent only a small fraction of the total recovery. Distribution of the recovery should be quite simple and inexpensive, since the recovery can be sent to those members of the class who are still shareholders of the Fund (approximately 85%) in a regular mailing by the Fund in the same way a dividend is distributed, and it can be mailed separately to the remaining members of the class who are no longer shareholders.

Defendants' reliance upon Eisen III in support of their contention is clearly misplaced. In Eisen III, this Court found that the average claim of a member of the class would be $1.30 per transaction trebled, or $3.90. That factor alone, however, was not dispositive. The cost of administering a recovery for a widely scattered class of six million persons, more than half of whom could not be identified, the tremendous problems of providing adequate notice to the class and the rejection of the "fluid recovery" theory urged by the plaintiff all contributed to the finding by the Court that the costs would exceed the potential recovery and that the case was "hopelessly unmanageable" as a class action. Eisen III quite obviously presented an extreme case.

It is clear that this Court, in Eisen III, did not hold that the class action procedure is inappropriate solely because of the relatively small dollar amount of an individual claim. That view would be directly contrary to the purpose of Rule 23 as it has been interpreted by the courts. Indeed, this Court has noted several times in the past the great need for an effective class action procedure to permit the redress of "wrongs otherwise unremediable because the individual claims involved were too small or the claimants too widely dispersed." Green v. Wolf Corporation, supra at p. 297. In Escott v. Barchris Construction Corp., supra this Court said:

> "In our complex, modern, economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. In a situation where we depend on individual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims, and the representative action provides that method. The holders of one or two of the debentures involved in the present action could hardly afford to take the risk of an individual action. The usefulness of the representative action as a device for the aggregation of small claims is 'persuasive of the necessity of a liberal construction of . . . Rule 23.'" (Footnote omitted, emphasis added.) 340 F.2d at 733.

In Eisen IV, Mr. Justice Douglas made the following observation in his concurring and dissenting opinion:

> "I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities or ventures who would go begging for justice without the class action but who could with all regard to due process be protected. Some of these are consumers whose claims may seem de minimis but who alone have no practical recourse for either remuneration or injunctive relief. . .
>
> "The class action is one of the few legal remedies the small claimant has against those who command the status quo." 417 U.S. at 185-6.

When Eisen III is read ,as it must be, against the background of Green and Barchris, and the instant case is compared, it becomes plain that this case presents precisely the kind of cohesive and manageable class that this Court found lacking in Eisen III.*

Thus, it is evident that the relatively small size of the individual claims herein raises no problems of manageability which should prevent this case from proceeding as a class suit. Surely, defendants should not be permitted to escape from liability for their violations of the federal securities laws and for the substantial damage which they have caused to the class simply because the individual claims of members of the class are relatively small.

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* It should be noted that class actions have been permitted on behalf of classes far larger than here because of the ease, as in the instant case, with which the members could be notified and the recovery could be distributed to them. Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971); Katz v. Carte Blanche Corp., 52 F.R.D.510 (W.D., Pa. 1971.)

Defendants also argue that the District Court abused its discretion in determining that this action could be maintained as a class action because of the supposed substantial problems of a jury trial in this type of case.* Fortunately, however, the courts, have not been deterred by the exaggerated expresssions of fear by defendants about such matters. In Blackie v. Barrack, supra, where the court was confronted with similar claims by the defendants, it did not regard the action as unmanageable because of the possibility of a jury trial. The Court noted:

> "...we are confident that the jury will be able to trace a graph delineating the actual value of the stock throughout the class period. When compared with a comparable graph of the price the stock sold at, the determination of damage will be a mechanical task for each class member. CCH Fed. Sec. L. Rep., Para. 95,312 at p. 98,587.

Furthermore,the courts have indicated that in securities class action cases such as this, a bifurcation of the trial may be had, where appropriate. See Green v. Wolf Corporation supra at p. 301. Moreover, in the instant case, as noted above, once liability has been established, the computation of individual damages should be nothing more than a mathematical computation. Accordingly, defendants' claims of unmanageability are not well-founded.

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* If defendants position were adopted, it would probably result in either there being no class actions or in the plaintiffs being required to forego their right to a jury trial in such actions.

In passing, we note that the defendants, in contending that the class claims are unmanageable and that the District Court abused its discretion in permitting the action to proceed as a class action, have also sought to argue the merits of this case. They suggest that they have valid defenses and that plaintiffs will not be able to prove their case and, that, in any event, the damages may not be as great as plaintiffs' claim. See defendant Manager's brief, pp. 39-43 and defendant Fund's brief, p. 22-25.*. In Eisen IV the Supreme Court quoted with approval from Miller v. Mackey International, 452 F.2nd 424 (5th Cir. 1971) as follows:

> "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." 417 U.S. at 178.

The District Court found on the basis of the record presented, that the class claims in the instant case were not unmanageable within the meaning of Rule 23(b)(3). The Court said:

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* It should be noted that contrary to defendants' assertions, there is evidence in the record (A-121) and applicable authority supporting plaintiffs position that the defendants violated the provisions of the Investment Company Act and the Securities Exchange Act in this case and that the defendants are liable to the class therefor. Investment Company Act Release No. 5847, October 21, 1969, CCH Fed. Sec. L. Rep., Par. 72,135; Matter of Winfield & Co., Inc., CCH Fed. Sec. L. Rep., Par. 78 0 (SEC Release, February 9, 1972); Brown v. Bullock, 191 F. Supp. 207 (S.D.N.Y. 1961) aff'd. 294 F.2nd 415 (2nd Cir. 1961). Furthermore, plaintiffs have filed Further Answers to defendants Interrogatories which were prepared with the assistance of qualified securities analyst and which confirm the fact that the class sustained aggregate damages in the sum of approximately $1,500,000 in this case.

> "On the basis of the information presently available, I am of the opinion that it would be inappropriate to declare these class claims unmanageable. At least as far as the present record shows, these class claims partake of no more difficulty than is attendent upon the claims in numerous class actions which the federal courts have entertained. If, at a later point in the action, clearer demonstration of unmanageability is made, the Court can deal with this problem." (A-173--A-174).

There is nothing in the record in this case which would warrant this Court in concluding that the District Court abused its discretion in reaching this determination. In this connection, it is well to keep in mind the admonition by the court in Esplin v. Hirschi, 402 F.2d 94 (10th) Cir. 1968), cert. denied, 394 U.S. 928:

> "...if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require. Eisen v. Carlisle & Jacqualin, 391 F.2d 555, 556 (2d Cir. 1968)." 402 F.2d at 99.

Since it is evident that the District Court made a careful examination of the facts in the instant case before rendering its decision, the determination by the District Court should not be disturbed unless the defendants establish that there has been an abuse of discretion. We respectfully submit that the defendants have clearly failed to show that the District Court did in fact abuse its discretion in determining that this action met the requirements of Rule 23 and that it may proceed as a class suit.

POINT III

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN DETERMINING THAT, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE FUND SHOULD BEAR THE COST OF CULLING OUT FROM ITS RECORDS A LIST OF CLASS MEMBERS

The issue in this case is not as defendants would have it, whether as a general rule, the cost involved in ascertaining the names and addresses of the members of the class should be regarded as a part of the cost of giving notice which should be borne by the plaintiffs. The question is whether the District Court committed reversible error in this case in determining that, under the facts and circumstances in this action, the Fund should bear the cost of culling out from its records a list of the class members.

In the instant case plaintiffs proposed a valid class consisting of all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund. The definition of the class proposed by plaintiffs would have simplified the issues in the case and facilitated the distribution of any recovery to the class members, and, most importantly, would have reduced the cost incident to giving notice to the class, thus, facilitating the further prosecution of the case as a class action.

There is substantial authority indicating that Rule 23 should be liberally construed and that the class should be defined so as to permit utilization of the class action procedure. In Dolgow v. Anderson, 43 F.R.D. 472, (E.D.N.Y. 1968), the Court said:

> "'***to effecutate the purpose of the securities laws, courts should employ the full measure of the discretion granted by the Rule, whenever a fair reading of the complaint permits, to define classes of injured investors in a manner which will permit utilization of the class action procedure'". 43 F.R.D. at 492.

In Dolgow which involved an action by purchasers of Monsanto stock the Court noted that it would probably not be difficult or expensive to notify the members of the class who were still holders of Monsanto and indicated that if notice to those persons who were no longer stockholders of Monsanto would create a problem "it might be necessary to limit the class to include only those who could be provided with notice from current Monsanto shareholder lists", 43 F.R.D. at 498. Furthermore, it has been held that the fact that some additional persons might be included in the class should not prevent the action from proceeding as a class action on behalf of a more limited class as defined by the plaintiffs even where the limitation on the scope of the class appears arbitrary. In State of Illinois v. Harper & Row Publishing Inc., 301 F.Supp. 484 (N.D. Ill. E. , 1969) an action was brought on behalf of all state and municipal agencies

which maintained libraries for the use of the general public, such libraries having annual book funds in excess of $10,000. In opposing a class action determination, the defendants argued that there was a selective composition of the class since the class included only the larger puchasers, but provided no redress for the small ones. The Court indicated that "the only issue was whether the absent class members allegedly the most seriously overcharged plaintiffs, should be denied recovery merely because smaller libraries or schools will not be compensated". In rejecting defendants' contention, the Court said:

> "Although the restriction on the classes' scope appears arbitrary, the enumerated members should not be penalized solely because the unrepresented libraries and schools will not receive redress for their overpayments". 301 F. Supp. at 494.

In passing, the Court in State of Illinois v. Harper & Row Publishing, Inc., supra, also noted that:

> "***other courts have sua sponte limited the size of class actions by deleting the smaller, less aggrieved members".* 301 F. Supp. at 493.

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*In the instant case, the persons who are no longer shareholders of the Fund are probably less aggrieved since, as defendants themselves have alleged, they have probably recaptured a substantial part of their over-payments as a result of having redeemed all of their shares.

Finally, even in Eisen IV, the Supreme Court indicated that the plaintiff could seek to redefine his class in order to satisfy the requirements of Rule 23, including the requirements of notice.

Thus, it is evident from the foregoing that the District Court, in the exercise of its discretion, could have granted plaintiffs' application with regard to the definition of the class.

The definition of the class sought by plaintiffs would have obviated the need for culling out the specific names and addresses of the members of the class from the Fund's records in order to give notice to the class, since, if all of the members of the class were current shareholders of the Fund, the class notice, as plaintiff suggested, could then be enclosed in a regular mailing by the Fund to all of its shareholders which would include all of the class members. Thus, the method of giving notice proposed by the plaintiffs would have provided for actual individual notice by mail to all members of the class and, accordingly, would have satisfied the provisions of Rule 23 and the requirements of due process. See Eisen III; Eisen IV; Advisory Committee Notes, 39 F.R.D. 69, 107; Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 70 Sup. Ct. 652 (1950).

Plaintiffs stated that they were prepared to pay the cost of giving notice to the class in the manner proposed by them which cost was estimated to be approximately $5,000. If it were necessary, however, to ascertain the names and addresses of the class members in order to give notice to the class, the total cost involved in giving notice would be in excess of $20,000 and the plaintiffs indicated that, if they were required to bear these costs, they could not continue prosecution of the action as a class suit.

Under the provisions of Rule 23, the Court has certain discretion to determine how notice should be given so long as the provisions of the Rule and the requirements of due process are satisfied. Eisen III at p. 1009 footnote 5; 3B Moore's Federal Practice, par. 23.55 at pp. 23-1151-1162 (2d Ed. 1969); Advisory Committee Notes, 39 F.R.D. 69, 107. The insertion of a notice in a regular mailing by a corporate defendant to its shareholders in order to reduce the cost of giving notice to the class has been favorably referred to by the courts. Zachary v. Chase Manhatan Bank; 52 F.R.D., 532 (S.D.N.Y. 1971); Dolgow v. Anderson; supra at p. 500; Popkin v. Wheelabrator-Frye,Inc. CCH Fed. Sec. L. Rep. Par. 95,068 at p. 97,748 (S.D.N.Y. 1975); Eisen IV at p. 180 fn. 1 (concurring and dissenting opinion). Furthermore, it is not unusual for a notice to be distributed to a group only some of whom will qualify as members of the class. In In re Antibiotics Antitrust Actions, 333 F. Supp. 291 (.S.D.N.Y. 1971) a notice to "CONSUMERS OF CERTAIN ANTIBIOTIC DRUGS"

was distributed on the basis of occupant mailing lists. The notice stated that "[t]his notice is given to you in belief that you may be a member of the above class whose rights may be affected by this lawsuit" and that "[i]f you purchased" certain drugs during a certain period "[y]ou will be deemed a party to this action and will be bound by the result . . . unless . . . you . . . request to be excluded from the class." 333 F.Supp. at 2194.

In Berland v. Mack, 48 F.R D. 121 (S.D.N.Y. 1969) notice was also sent to some people who were not members of the class in order to insure that all members of the class would receive the notice. Thus, the notice was sent to all persons listed as purchasers on the transfer records of the company between the period March 21, 1966 and May 13, 1966 even though the class included only those persons who purchased shares between March 21, 1966 and April 29, 1966.

The defendants, however, opposed the definition of the class sought by plaintiffs which limited the class to persons who were still stockholders of the Fund, presumably because it would limit the res judicata effect of this action. However, it is evident that the defendants in seeking to have the class more broadly defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class) were interested in increasing the cost involved in giving notice in an effort to prevent the action from proceeding as a class suit.

The defendants also objected to the distribution of the class notice in the manner proposed by the plaintiffs, claiming that this method would result in the notice being received by approximately 68,000 out of 171,000 shareholders of the Fund who were not members of the class and that this would have an adverse effect on the Fund, including allegedly precipitating a flood of redemptions by these shareholders. It is difficult to understand the defendants' claims of prejudice in light of the fact that the stockholders of the Fund had been advised of the pendency and nature of this litigation in the proxies, prospectuses and annual reports of the Fund no less than 13 times since 1970. Accordingly, the defendants' contention that informing the stockholders of the Fund for perhaps the fourteenth time of the pendency and nature of this litigation would have on adverse effect on the Fund and its current stockholders was questionable, to say the least. In Miller v. Mackey International Inc. 452 F.2d 424 (5th Cir. 1971) the defendant, in opposing a class action determination, contended that notice to the shareholders of the defendant company would "seriously injure the financial position" of the corporation. In rejecting the defendant's contention on this point, the Court said:

> "Even if we were to assume that grave consequences to a defendant might follow from Rule 23 notice, such is not the situation presented here. Mackey has itself apprised its stockholder of this litigation. On March 30, 1970, a letter to stockholders signed by the company's President stated:

> On February 11 a stockholder with 100 shares of stock entered a civil action against the company in New York. The suit alleges that the registration statement and prospectus pertaining to our public offering contained untrue statements of material fact or omitted to state material facts. I do not wish to comment in detail on this action since our attorneys are in the process of filing an answer. The company believes that this action is without merit and that the company has meritorious defenses against it.

> Furthermore, Mackey has prepared and disseminated a Preliminary Prosepctus dated January 27, 1971, for a proposed secondary public offering containing five paragraphs pertaining to the instant suit and describing the claims presented, explaining the company's position, and stating the company's opinion of ultimate success". 452 F 2d at 429.

Defendants also argued in the District Court that since the identity of each member of the class could be ascertained, notice should be sent only to those persons, regardless of the considerable extra expense involved. Defendants, however, misconstrued the notice requirements of Rule 23 by placing undue emphasis on the precise identification of class members and ignoring the true purpose of Rule 23 (c)(2) which was to insure that the members of the class received the best notice practicable of the pendency of the action including individual notice by mail where that could be accomplished through reasonable effort. The Rule does not require that the

names and addresses of the class members be identified prior to sending notice to the class so long as the class members receive individual notice by mail.* Nothing in Rule 23 or in any of the Eisen decisions prohibits the sending of notice to a group of persons which is larger than the actual class, if it is evident, as in the instant case, that all the members of the class will be reached. Certainly nothing in Eisen suggests that it is improper for the Court to minimize the cost of notice consistent with the requirements of Rule 23 and due process.

Thus, in the instance case, the District Court, in the exercise of its discretion, could have identified the class as requested by the plaintiffs and directed that notice be given in the manner proposed by the plaintiffs, thereby obviating the need to cull out from the records of the Fund a list of the specific names and addresses of the class since this procedure would have complied with the provisions of Rule 23 and the requirements of due process. Instead, the District Court, in the exercise of its discretion, decided that it would grant defendants' requests with regard to the definition of the class and the method of giving notice to the class and that it would hold defendants responsible for the extra costs involved in defining the class and giving notice in the manner sought by them; and the District Court directed the Fund to bear the cost of culling out a list of the names and addresses of the class members from the records

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* The fact that plaintiffs have not identified the members of the class by name prior to sending notice to the class clearly does not preclude the maintenance of the action as a class suit. Fischer v. Kletz, 41 F.R.D. 377, 384 (S.D.N.Y. 1966).

of the Fund.* The Distict Court's rulings with regard to the definition of the class, the method of giving notice to the class and the allocation of the cost of culling out from the records of the Fund, a list of the names and addresses of the class members, are obviously interrelated and reflect the Court's considered judgment as to a fair overall disposition of this matter, taking into account the respective positions and proposals urged by the parties with respect to these matters.**

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* The District Court indicated that its ruling was without prejudice to the right of the Fund at the conclusion of the action to make whatever claim it would legally be entitled to make regarding reimbursement by another party. Thus, the Fund may seek contribution from the other defendants. This cost would not appear, however, to be taxable against the plaintiffs since it is not specifically allowed as a taxable cost under local court rules or under applicable statutes (28 U.S.C. Section 1920). See 6 Moore's Federal Practice Par. 54.77 (1) at p. 1701. While the District Court has some discretion under Rule 54 (d) of the FRCP to award costs not specifically allowed by statute, this discretion should be sparingly exercised, Farmer v. Arabian American Oil Company, 279 U.S. 227 (1964); 6 Moore's Federal Practice, Par. 54.77 (1) at p. 1702; and, under the facts and circumstances of this case, it is doubtful whether this cost would be taxed against the plaintiffs in the event the defendants were successful. Of course, if plaintiffs prevail in this action, then the question of taxing this cost against the plaintiffs would become moot. The Fund might, however, if plaintiffs prevail seek reimbursement for this cost in connectin with the administation of the recovery. In any event, this matter is not now before this Court and must await further developments. See also 6 Moore's Federal Practice, Par. 54.70 (5) at pp. 1319-1320.

** The Distict Court did not decide, as the defendant Manager erroneously claims in its brief, (pp. 33-34) that the method of giving notice proposed by the plaintiffs was improper or that the defendants' claims of harm resulting from giving notice in this manner were, in any sense, well founded. The District Court on the contrary, in the exercise of its discretion, reached what it regarded as a fair and appropriate "solution" of the matter which accommodated the respective wishes of the parties. On the one hand, it granted defendants' request with respect to the definition of the class and agreed to limit distribution of notice to class members

With regard to the cost of culling out the list of the names and addresses of the class members, the Court simply determined that it would be appropriate on the basis of facts and circumstances in this case that this additional expense, which was necessitated solely by the defendants' requests with regard to the definition of the class and the method of giving notice to the class be the responsibility of the defendants and the Court indicated that the Fund should bear the cost of culling out from its records a list of the names and addresses of the class in this case. In reaching this decision the Court stated:

> "Moreover, with respect to the cost of culling out the list of class members, I am ruling that this is the responsibility of defendants. Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (A-175)

Footnote continuted from p. 46

only (whether defendants' assertions of potential harm were justified or not) and, on the other hand, it determined that the defendants should be responsible for the additional costs of specifically identifying the members of the class since it was the defendants who had made these extra costs necessary. It is interesting to note that, contrary to the assertions of the defendant Manager, the defendant Fund expressed the view in its brief (p.19) that the District Court by its rulings in this case, in effect, approved the propriety of the method of giving notice proposed by the plaintiffs. We agree that the District Court recognized that the method of giving notice proposed by the plaintiffs was not legally improper and that, accordingly, it was a reasonable exercise of discretion for the District Court to require the defendants to bear the cost of identifying the names and addresses of the class members since this cost would not have been required under the definition of the class and the method of giving notice proposed by plaintiffs.

Where the defendants, as in the instant case, insist upon a definition of the class and a method of giving notice which creates additional costs which would not be involved in giving notice in the manner proposed by the plaintiffs to the class defined by them, then it is clearly not, we submit, unreasonable or inappropriate for the Court to hold the defendants responsible for these added unnecessary costs.

In referring to the additional costs as "relatively modest", the District Court was no doubt mindful of the fact that $16,000 is not a great burden to bear for a corporation with over $500,000,000 in net assets in consideration for having the Court go along with its proposals to have the class defined more broadly and to have notice distributed in a manner preferred by the defendants.

The determination by the District Court does not in any way violate the principles set forth by this Court in Eisen III. First of all, while Eisen III and Eisen IV clearly indicate that the usual rule is that the plaintiff has the burden of preparing and distributing the notice to the class they do not expressly deal with the question of who should pay for the cost of identifying members of the class prior to giving notice.

Furthermore, in Eisen III while this Court held that it was improper under the circumstances of that case to require defendants to bear 90% of the cost of notice and that the plaintiff should normally pay the cost of notice, it is clear that this Court did not intend to establish a hard and fast rule that in all cases, irrespective of the particular facts and circumstances involved, plaintiffs must

be required to pay all costs incident to giving notice, including the cost of identifying members of the class. This Court specifically stated:

> "Nor did we decide or intend to say that in all cases or under all circumstances plaintiffs in class actions are or must be required to defray the cost of giving the various notices specified in amended Rule 23. *** There may be other similar examples of class actions in which, depending on the circumstances of particular cases, courts might find jurisdiction for holding that a representative plaintiff was not obligated to defray the cost of giving the notices required by amended Rule 23. We do not attempt any enumeration". 479 F.2d at 1009 Fn. 5.

We submit that under the facts and circumstances of this case, the District Court was fully justified in determining, in the exercise of its discretion, that the defendants who had necessitated these additional costs should be required to bear these costs rather than the plaintiffs.

Other Courts have reached the same conclusion as the District Court in this case that the defendants may be required to bear the cost of identifying the members of the class prior to the giving of notice. In Berland v. Mack, 48 F.R.D. 121, (S.D.N.Y. 1969), which was recently cited with approval in Popkin v. Wheelabrator-Frye, Inc., supra, Judge Mansfield required the defendant, at its expense, to furnish to the plaintiffs' counsel a list of the members of the class. Judge Mansfield directed that:

"...defendant GAI, at its expense, will furnish to plaintiffs' counsel a list of the names and addresses of all persons who registered with Registrar and Transfer Company acquisitions of GAI common stock during the period from March 21, 1966 to May 13, 1966 with the number of shares acquired by each". 48 F.R.D. at 133. [Emphasis supplied.]

Furthermore, the determination by the District Court in this case is also consistent with the approach taken by the court in Berland v. Mack, supra, where Judge Mansfield ordered that, if notice by publication was requested by either party in addition to individual notice by mail, (the defendant had so requested), then a copy of the notice would be published and the cost of notice by publication would be borne by the party requesting it. By the same token, if defendants insist upon specifically identifying the members of the class so that the class can be defined and notice can be given in a manner preferred by them, notwithstanding the fact that plaintiffs had proposed a valid class and a method of giving notice which complies with the provisions of Rule 23 and due process and which does not involve a costly identification process, then the defendants should also assume responsibility for the extra costs incident to having the class defined and notice given in the manner requested by them.

None of the cases cited by defendants support their claim that it was reversible error for the District Court to require the Fund to bear the cost of culling out from its records a list of the class members, under the facts and circumstances of this case. For example, in Grad v. Memorex Corporation, 61 F.R.D.

88 (N.D. Cal. 1973) the plaintiff had agreed to pay for the cost of identifying the class members prior to the plaintiff's notice. Thus there was no opportunity for the Court to consider whether the request for identification would be imposed upon the plaintiff over his objection when such identification was unnecessary. In B&B Investment Club v. Kleinert's, Inc., CCH Fed. Sec. L. Rep. Par. 94,451 (E.D.Pa. 1974), the Court cited with approval the procedure followed in Berland v. Mack, supra, for identifying the members of the class. Thus the decision in B&B Investment Club does not support defendants' contention that the plaintiffs should bear the burden of these unnecessary costs of identification in this case. In State of Illinois v. Harper & Row Publishers, Inc., 301 F.Supp. 484 (N.D. Ill. 1969), the plaintiffs were state and municipal governments who brought actions on behalf of public libraries, school districts and boards of education within their jurisdiction. Thus the information relating to the identification of the members of the class was clearly within the possession of the plaintiffsa and thus it was not necessary for them to conduct discovery of the defendants in order to identify the members of the class.

The determination by the District Court is also consistent with the principles applicable under the federal discovery rules. Under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data even though a considerable burden or expense may be involved. If the information sought is relevant and material, a responding

party, under the federal discovery rules, in order to shift the expense to the other side must show not only that the request for information is burdensome, but that the burden is so excessive as to be unreasonable or oppressive. 4A Moore's Federal Practice, Par. 33.20; Caldwell Clements, Inc. v. McGraw Hill Publishing Co. 12 F.R.D. 531, 538 (S.D.N.Y. 1952); U.S. v. Nysco Laboratories Inc., 26 F.R.D. 159, 161-162 (S.D.N.Y. 1960); American Oil Co. v. Pennsylvania Petroleum Products Co., 23 F.R.D. 680, 683 (D.R.I. 1959). Specifically, with regard to the obligation of a responding party under the federal rules to provide information which is contained in computer tapes, Professors Wright and Miller stated in their well-known treatise:

> "The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense'" 8 Wright & Miller, Federal Practice and Procedure, Section 2218 at page 659.

Thus, parties may be required to undergo substantial burdens and expense in furnishing information under the discovery rules so long as the burdens are not unreasonable or oppressive. We submit that to require the defendants in this case to pay for the cost of culling out a list of class members from the Fund's records can hardly be regarded as "unreasonable" or "oppressive" when it is the defendants themselves who have made it necessary to obtain this information.

The issue in this case is not, as defendants put it, whether the cost of obtaining information from computer tapes should generally be borne by the responding party. The issue is rather, whether the District Court, in determining under the facts and circumstances of this case, that it would be reasonable and appropriate for the defendants to have responsibility for the added expense involved in discovering this information, was guilty of an abuse of discretion.* It is well recognized that the District Court has wide discretion in matters of discovery, including the allocation of costs relating thereto. Harvey v. Eimco Corp., 28 F.R.D. 381 (E.D. Pa. 1961). See generally 4A Moore's Federal Practice Par.33.02 at page 33-17 and Par. 33.20 at pp. 33-100, 33-101 (1975 Ed.) We submit that the District Court in this case clearly did not abuse its discretion in determining that the defendants should bear these costs in this case.

The decision of the District Court in the instant case is also compatible with the principles set forth in Eisen

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* None of the cases cited by defendants dealing with the discovery rules are relevant to this case. They all deal with the usual situation where a plaintiff seeks information from the defendant to use in prosecuting his claim against the defendant. In none of these cases was it the defendant, as in the instant case, who initiated the need for said information.

IV since the Supreme Court was also careful to avoid establishing any hard and fast rules that, in all cases, the plaintiff must be required to pay all costs incident to giving notice to the class, including the cost of identifying the members of the class. The Supreme Court simply indicated that the "usual rule is that the plaintiff must initially bear the cost of notice to the class" and it affirmed this Court's determination that the plaintiff, based upon the facts in Eisen III, must bear the cost of distributing notice to the class in that case. Indeed, the Supreme Court specifically refrained from expressing any opinion as to the proper allocation of the cost of notice in other cases involving different factual situations. See Eisen IV at footnote 15.

Furthermore, in Dolgow v. Anderson, supra, which was specifically referred to by the Supreme Court in Eisen IV as a different kind of situation, the court indicated that a corporation might be required to pay for the cost of notifying the members of the class who were shareholders of the corporation on three grounds: (1) because of the fiduciary obligations owed by the corporation to its shareholders; (2) the advantage to the corporation of a judgment with res judicata effect against the class and (3) the ability to bear the cost. All three of these grounds for requiring the corporation to bear the cost of notice are present in the instant case. In this case, the Fund has fiduciary obligations to its 103,000 shareholders who are members of the class; the class has been defined

as requested by the Fund and the other related defendants, more broadly than that sought by the plaintiffs so that the defendants will have the advantage of a judgment with broader res judicata effect, and the Fund obviously has a greater ability to bear the cost than the plaintiffs.

Moreover,while the court in Dolgow was discussing the question of whether the aforementioned facts and circumstances justified imposing the entire cost of notice upon the defendants, it should be kept in mind that, in the instant case, all that the District Court has required the Fund to bear is the cost involved in culling out a list of the class members from the Fund's records, a cost which has been necessitated by the defendants themselves. The District Court has required the plaintiffs to pay for all of the costs of preparing the notice and any extra costs of mailing involved in sending out the notice in a regular mailing of the Fund to the class members, including the cost of segregating the envelopes going to the class members and the envelopes going to other shareholders. In addition, under the District Court's decision, the plaintiffs will bear the full cost of sending out the notice to those members of the class who are no longer shareholders of the Fund.

It is clear that the District Court, in the instant case, fully recognized the general principles set forth by the this Court and the Supreme Court in Eisen and it is further clear that the District Court did not attempt to lay down

any general rules regarding the allocation of the costs of identifying the members of the class. The District Court simply determined that, under the particular facts and circumstances of this case, it would be appropriate to have the defendants and, in particular the Fund, bear the cost of culling out a list of class members from the records of the Fund.

We respectfully submit that the District Court reached a fair and equitable result in the instant case and one which does no violence to the provisions of Rule 23 and was well within the proper exercise of its discretion. We further submit that the defendants have totally failed to demonstrate that the District Court committed reversible error in this case. Accordingly the decision of the District Court should not be disturbed.

CONCLUSION

For the reasons stated herein, this Court should dismiss the appeals herein, or, in the alternative, should affirm the interlocutory order and decision of the District Court.

Respectfully submitted,

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Service of 2 copies of this within
Brief is admitted this
23 day of February 1976

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